

*file*

**BEFORE THE  
STATE OF WISCONSIN  
Division Of Hearings And Appeals**



---

Application of Joseph Schoendorf, Jr., for a Permit  
to Construction a Solid Pier on the Bed of Green  
Bay, Village of Ephraim, Door County

---

Case No. 3-LM-96-574

**ORDER FOR DISMISSAL**

Pursuant to due notice on October 7, 1997, a hearing was held at Egg Harbor, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Joseph Schoendorf, Jr., by

Waltraud A. Arts, Attorney  
Quarles & Brady  
P. O. Box 2113  
Madison, Wisconsin 53701-2113

Gunnell Family, by

Gary A. Glojek, Attorney  
Glojek Limited  
6212 West Greenfield Avenue  
West Allis, Wisconsin 53214

Wisconsin Department of Natural Resources, by

Peter D. Flaherty, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

## FINDINGS OF FACT

1. On December 5, 1996, Mr. Joseph Schoendorf, Jr., 184 W. Wisconsin Avenue, Suite 400, Milwaukee, Wisconsin 53201, applied to the Department of Natural Resources for a permit to add on to an existing pier a steel sheeting and rock pier. The new addition would be 25 feet long by 14 feet wide with a 35 foot long by 14 foot wide "L" extension on the bed of Green Bay. The project would be located in the NW ¼ of the SW ¼ in Section 13, Township 31 North, Range 27 East, Village of Ephraim, Door County, Wisconsin.

2. On March 7, 1997, the applicant published a Notice of Proposed Solid Pier, which described the project as set forth above, in the Door County Advocate. (Ex. 3) That Notice stated in part that the DNR might rule on the issuance without a public hearing if written objection was not received within 30 days of the date of publication. (Id.)

3. On April 7, 1997, the Department issued a Structure Permit approving placement of the structure described above, subject to certain limitations and conditions. (Ex. 4) No objections to the proposed pier had been received as of the date of issuance of the permit.

4. On June 20, 1997, over two months after the permit had been issued, the Department received a letter of objection on behalf of the Gunnell family.

5. On June 24, 1997, the DNR Area Water Management Specialist, Ms. Tere Duperrault sent a letter to the applicant advising him of the Gunnell objection and referring the matter to Department legal counsel to "... determine if a hearing will be granted or not." (Ex. 19)

6. On September 16, 1997, the DNR forwarded the file to the Division of Hearings and Appeals.

7. At the outset of the hearing on October 7, 1997, the applicant moved to dismiss the proceeding for lack of jurisdiction, because Mr. Schoendorf already possessed a permit issued by the Department authorizing placement of the structures.

8. At hearing, the objectors and the Department argued that the permit should be considered void because no formal notice of the proposed project was received by the neighboring riparians, the Gunnells. The applicant provided somewhat incomplete information on his permit application with respect to the name and address of the Gunnells. (Ex. 2)

9. On February 24, 1997, the DNR sent a Notice of the proposed project to "Ms. Elias Gummel, Ocean Reef Club, PO Box 10, Key Largo, FL 33037." (Ex. 18) The U.S. Postal Service returned the Notice marked, Undeliverable as Addressed/Unable to Forward." This envelope (containing the Notice) was returned to the Department prior to issuance of the permit on April 7, 1997.

10. Mrs. Elias Gunnell's correct address is as follows:

Mrs. Elias Gunnell  
Ocean Reef Club  
100 Anchor Drive, #10  
Key Largo, FL 33037

The writing on the application could reasonably be read as either "Gummel" or "Gunnell."

11. However, counsel for the Gunnells indicated that Mrs. Gunnell is not the riparian owner of record. Instead, counsel represented, the parcel is owned by Mrs. Gunnell's four adult children.

12. Pursuant to sec. 30.07(2), Stats., upon a showing of "good cause," the Department has legal authority to "... modify or rescind any permit or contract issued under sec. 30.01 to 30.29 before its expiration." This authority would obviously extend to the sec. 30.12, Stats., permit issued to Schoendorf.

13. The Department has not formally rescinded the permit issued to Schoendorf on April 7, 1997. If the DNR were to do so, it would bear the burden of showing "good cause" to do so, and the permit-holder would be entitled to a hearing on the discreet issue of whether the Department had "good cause" to rescind the permit. It may well be that the Department will determine that the problem of failure to provide actual notice to the neighboring riparians was a "good cause" to rescind the permit within the meaning of sec. 30.07, Stats. Because this issue was not noticed for hearing, the ALJ does not reach the merits of this issue.

14. Because Schoendorf had a permit issued pursuant to sec. 30.12, Stats., and said permit was not formally rescinded by the Department, it would be a violation of fundamental fairness and due process to Schoendorf to require him to proceed with a costly sec. 30.12, Stats. hearing. Schoendorf did not receive Notice of a Class 2 Proceeding to rescind the permit.

15. Until such time as the permit-holder's permit is rescinded, the Division lacks jurisdiction over the sec. 30.12, Stats. permit matter. The Motion to Dismiss was, accordingly, granted by the ALJ.

#### CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

3. The applicant, on April 7, 1997, was issued a permit by the DNR indicating that the Department was satisfied that the application met all of the requirements of sec. 30.12(2), Stats.

4. The Department has legal authority to rescind a permit issued pursuant to sec. 30.12(2), Stats., upon a showing of "good cause." Section 30.07(2), Stats. The Department has to this point not formally determined that there exists "good cause" to rescind the permit issued for the structures described above, and has not provided Notice and Appeal Rights to the permit-holder to this effect.

5. The project is a type III action under sec. NR 150.03(8)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

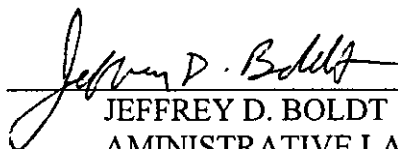
### ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the above-captioned matter be DISMISSED, for lack of jurisdiction.

Dated at Madison, Wisconsin on October 16, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

BY:



JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.